97TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 97-221

INTELLIGENCE IDENTITIES PROTECTION ACT

SEPTEMBER 10, 1981.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. BOLAND, from the Permanent Select Committee on Intelligence, submitted the following

REPORT

together with

SEPARATE VIEWS

[To accompany H.R. 4]

The Permanent Select Committee on Intelligence, to whom was referred the bill (H.R. 4) to amend the National Security Act of 1947 to prohibit the unauthorized disclosure of information identifying certain United States intelligence officers, agents, informants, and sources, having considered the same report favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

That is Act may be cited as the "Intelligence Identities Protection Act".

SEC. 2. (a) The National Security Act of 1947 is amended by adding at the end thereof the following new title:

"TITLE VI—PROTECTION OF CERTAIN NATIONAL SECURITY INFORMATION

"DISCLOSURE OF IDENTITIES OF CERTAIN UNITED STATES UNDERCOVER INTELLIGENCE OFFICERS, AGENTS, INFORMANTS, AND SOURCES

"SEC. 601. (a) Whoever, having or having had authorized access to classified information that identifies a covert agent, intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $50,000 or imprisoned not more than ten years, or both.

"(b) Whoever, as a result of having authorized access to classified information, learns the identity of a covert agent and intentionally discloses any information

identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $25,000 or imprisoned not more than five years, or both.

"(c) Whoever, in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure, discloses, to any individual not authorized to receive classified information, any information that identifies a covert agent knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

"DEFENSES AND EXCEPTIONS

"SEC. 602. (a) It is a defense to a prosecution under section 601 that before the commission of the offense with which the defendant is charged, the United States had publicly acknowledged or revealed the intelligence relationship to the United States of the individual the disclosure of whose intelligence relationship to the United States is the basis for the prosecution.

"(b)(1) Subject to paragraph (2), no person other than a person committing an offense under section 601 shall be subject to prosecution under such section by virtue of section 2 or 4 of title 18, United States Code, or shall be subject to prosecution for conspiracy to commit an offense under such section.

"(2) Paragraph (1) shall not apply (A) in the case of a person who acted in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure, or (B) in the case of a person who has authorized access to classified information.

"(c) It shall not be an offense under section 601 to transmit information described in such section directly to the Select Committee on Intelligence of the Senate or to the Permanent Select Committee on Intelligence of the House of Representatives.

"PROCEDURES FOR ESTABLISHING COVER FOR INTELLIGENCE OFFICERS AND EMPLOYEES

"SEC. 603. (a) The President shall establish procedures to ensure that any individual who is an officer or employee of an intelligence agency, or a member of the Armed Forces assigned to duty with an intelligence agency, whose identity as such an officer, employee, or member is classified information and which the United States takes affirmative measures to conceal is afforded all appropriate assistance to ensure that the identity of such individual as such an officer, employee, or member is effectively concealed. Such procedures shall provide that any department or agency designated by the President for the purposes of this section shall provide such assistance as may be determined by the President to be necessary in order to establish and effectively maintain the secrecy of the identity of such individual as such an officer, employee, or member.

"(b) Procedures established by the President pursuant to subsection (a) shall be exempt from any requirement for publication or disclosure.

"EXTRATERRITORIAL JURISDICTION

"SEC. 604. There is jurisdiction over an offense under section 601 committed outside the United States if the individual committing the offense is a citizen of the United States or an alien lawfully admitted to the United States for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act).

"PROVIDING INFORMATION TO CONGRESS

"SEC. 605. Nothing in this title shall be construed as authority to withhold information from Congress or from a committee of either House of Congress.

"DEFINITIONS

"SEC. 606. For the purposes of this title:

"(1) The term 'classified information' means information or material designated and clearly marked or clearly represented, pursuant to the pro-

visions of a statute or Executive order (or a regulation or order issued pursuant to a statute or Executive order), as requiring a specific degree of protection against unauthorized disclosure for reasons of national security.

"(2) The term 'authorized', when used with respect to access to classified information, means having authority, right, or permission pursuant to the provisions of a statute, Executive order, directive of the head of any department or agency engaged in foreign intelligence or counterintelligence activities, order of a United States court, or provisions of any Rule of the House of Representatives or resolution of the Senate which assigns responsibility within the respective House of Congress for the oversight of intelligence activities.

"(3) The term 'disclose' means to communicate, provide, impart, transmit, transfer, convey, publish, or otherwise make available.

"(4) The term 'covert agent' means—

"(A) an officer or employee of an intelligence agency, or a member of the Armed Forces assigned to duty with an intelligence agency—

"(i) whose identity as such an officer, employee, or member is classified information, and

"(ii) who is serving outside the United States or has within the last five years served outside the United States;

"(B) a United States citizen whose intelligence relationship to the United States is classified information and—

"(i) who resides and acts outside the United States as an agent of, or informant or source of operational assistance to, an intelligence agency, or

"(ii) who is at the time of the disclosure acting as an agent of, or informant to, the foreign counterintelligence or foreign counterterrorism components of the Federal Bureau of Investigation; or

"(C) an individual, other than a United States citizen, whose past or present intelligence relationship to the United States is classified and who is a present or former agent of, or a present or former informant or source of operational assistance to, an intelligence agency.

"(5) The term 'intelligence agency' means the Central Intelligence Agency, the foreign intelligence components of the Department of Defense, or the foreign counterintelligence or foreign counterterrorist components of the Federal Bureau of Investigation.

"(6) The term 'informant' means any individual who furnishes information to an intelligence agency in the course of a confidential relationship protecting the identity of such individual from public disclosure.

"(7) The terms 'officer' and 'employee' have the meanings given such terms by sections 2104 and 2105, respectively, of title 5, United States Code.

"(8) The term 'Armed Forces' means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

"(9) The term 'United States', when used in a geographic sense, means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.".

(b) The table of contents at the beginning of such Act is amended by adding at the end thereof the following:

"TITLE VI—PROTECTION OF CERTAIN NATIONAL SECURITY INFORMATION

"Sec. 601. Disclosure of identities of certain United States undercover intelligence officers, agents, informants, and sources.
"Sec. 602. Defenses and exceptions.
"Sec. 603. Procedures for establishing cover for intelligence officers and employees.
"Sec. 604. Extraterritorial jurisdiction.
"Sec. 605. Providing information to Congress.
"Sec. 606. Definitions.".

INTRODUCTION

A critical need for the effective conduct of United States foreign and defense policy is the production and analysis of high quality intelligence information. Further, United States policy interests and involvement have expanded in both these areas so that the demand for intelligence has also increased dramatically. The President and an ever larger group of high level policymakers want an increasingly sophisti-

cated, highly specialized flow of information on such broad-ranging topics as strategic force structure, nuclear proliferation, international terrorism, oil pricing policies, drug trafficking, Third World economic growth—not to mention the activities of hostile intelligence services.

As critical as the need for finished intelligence products is the need for the means to collect intelligence. A variety of methods—some highly technical and sophisticated—are employed by the United States intelligence community for this purpose. Notwithstanding the essential contribution of these systems, however, there continues to be a need for traditional human intelligence collection. Without the often unique contribution of human collectors—undercover intelligence operatives and those who aid them—the United States government would be without needed insights into the actual plans and intentions of foreign powers it must confront or the international problems it must solve. Further, as the United States seeks to implement its foreign policy objectives, it requires in unusual and important situations the capability to use clandestine operators to complement its overt policy initiatives.

Intelligence operatives have always faced risks from exposure. Espionage is criminal activity in the country in which it occurs. In many countries today, to the threat of expulsion or imprisonment for spying must be added the possibility of terrorist attack directed at intelligence operatives who are exposed. Thus U.S. intelligence operatives are provided protection in the form of alias identification and disguise. They in turn conceal through tradecraft their relationship to those from whom they seek information or assistance in carrying out their intelligence assignments. Such arrangements—cover and clandestine means of communication—are employed by all intelligence services throughout the world. They seek to protect the viability of the intelligence services' operations and the personal safety of their officers and agents. In the process, they avoid the embarrasment exposure would bring to the countries on whose behalf these services operate.

The exposure of a U.S. intelligence officer abroad always carries with it the loss or diminution of that officer's cover, with a concommitant loss in his effectiveness as a secret operative for his government. Further, in some circumstances, his life or the lives of his family may be jeopardized. In testimony before the Committee, the Director of Central Intelligence, William J. Casey, pictured this situation in the following telling fashion:[1]

> Last July, only luck intervened to prevent the death of the young daughter of a U.S. Embassy officer in Jamaica whose home was attacked only days after one of the editors of a publication called CovertAction Information Bulletin appeared in Jamaica, and at a highly publicized news conference gave the names, addresses, telephone numbers, license plates, and descriptions of the cars of U.S. Government employees whom he alleged to be CIA officers. Most recently, six Americans were expelled from Mozambique following charges of engaging in espionage. These expulsions followed visits to that country by members of the Cuban intelligence

[1] "H.R. 4, The Intelligence Identities Protection Act, Hearings before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence," House of Representatives, 97th Congress, 1st session, p. 13.

> service and the editors of the CovertAction Information Bulletin.
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> Our relations with foreign sources of intelligence have been impaired. Sources have evinced increased concern for their own safety. Some active sources and individuals contemplating cooperation with the United States have terminated or reduced their contact with us. Sources have questioned how the U.S. Government can expect its friends to provide information in view of continuing disclosures of information that may jeopardize their careers, liberty, and very lives.

These results are always harmful to U.S. interests since, beyond these most basic disadvantages, such an exposure embarrasses the United States Government and may complicate its relations with another government while demoralizing, or resulting in the loss of, the officer. Yet such exposures sometimes occur and it is a measure of the resiliency of an intelligence agency in how it adjusts to such setbacks.

It is more than a setback, however, when undercover intelligence operatives become the target of repeated, systematic exposures by individuals or groups bent on the production of all of the effects enumerated above and with the goal of destroying this essential U.S. intelligence capability. Yet, this has been the experience of the Central Intelligence Agency in recent years. Individuals—former employees among them—and several publications have taken it upon themselves to discover and disclose wholesale the identities of undercover CIA and other intelligence officers and those foreign nationals with whom they work.

The motivation for these acts has been advanced clearly and repeatedly—that exposure of all U.S. intelligence operatives will prevent them from performing their duties and thereby render powerless the agencies for which they work.

These activities have been successful to a point. They have resulted in the loss—measured in terms of training, expertise, morale and expense—of seasoned clandestine officers and valuable agents of U.S. intelligence agencies. That loss in turn has affected adversely the flow of intelligence necessary for the formulation of U.S. policies. Lamentably, the clear indication has been that an exposure of undercover CIA officers has played a part in attacks on the lives of those individuals. In one tragic instance, the attack was fatal. In many more cases, harassment, threats and the fear of them have taken their toll on other exposed officers and their families.

In the opinion of the Committee, the unauthorized disclosure of the names of undercover intelligence agents is a pernicious act that serves no useful informing function whatsoever. It does not alert us to abuses; it does not further civil liberties; it does not enlighten public debate; and it does not contribute one iota to the goal of an educated and informed electorate.

Whatever the motives of those engaged in such activity, the only result is the disruption of our legitimate intelligence collection programs—programs that bear the imprimatur of the Congress, the President, and the American people. Such a result benefits no one but our adversaries.

Moreover, disaster, or its stepchild, terror, stalks those whose lives have been troubled by this campaign of disruption. It is the opinion of the Committee that it is enough that covert agents must expect a life of adversity as a result of their calling. The Congress and the American people cannot ask them and their many colleagues to continue to travel the secret ways of the world's capitals without a recognition and a response to the perils they face and can ill avoid.

It is in this context that the Committee has considered H.R. 4. The bill, which criminalizes disclosure of intelligence identities, is a direct result of the Committee's conclusion that such disclosures harm the nation's ability to conduct foreign policy and provide for the common defense and can place in jeopardy or severe apprehension of harm dedicated and loyal men and women who serve their country in a difficult and dangerous profession.

Summary of Legislation

Although the Committee condemns witting disclosures of undercover intelligence identities, it does not seek to criminalize such acts in every context. The Committee recognizes fully that the bill's proscriptions operate in an area fraught with first amendment concerns and has limited its scope in order to criminalize only those disclosures which are made by an individual who has assumed a position of trust or those disclosures occurring in the context of a pattern or practice of identification and exposure intended to impair U.S. intelligence capabilities by the fact of such identification and exposure.

Thus, the bill applies to three well defined and limited classes of individuals. The first consists of those who have had authorized (i.e., officially recorded) access to classified information identifying undercover operatives, or "covert agents", as they are termed by the bill. This class would include only those individuals—principally government co-workers or supervisory officials—who would have had a need to know the identity of an undercover officer or an agent. This class therefore includes only those who have undertaken never to reveal information to which they have been given access. Their promise of secrecy was the reason for their being provided access to the identities of covert agents, and disclosures—and disclosures alone—of the identities they learned in this fashion are the most heavily penalized by the bill.

The second class of individuals also includes those who have access to classified information, but not necessarily that which explicitly identifies covert agents. For a member of this class, however, it must be shown that as a result of that access to classified information he learned an intelligence identity. This class would include those in government whose jobs place them in a position to meet, or discern the identities of, covert agents. Although the government need not be able to prove that individuals in this class have had officially processed and approved access to the actual identities of covert agents, it must show that as a result of the position which they held they learned such identities. Within certain higher level circles of government such circumstances are not uncommon. Since individuals in this class have also sworn to maintain the secrecy of classified information pro-

vided to them, they are believed by the Committee to occupy a position of trust akin to, but less than, that binding those individuals included in the first class. Thus, disclosures by the second class are penalized less severely than those of the first class but still more severely than the third class.

The third and last class of individuals affected by the bill are those who, although they never have held the position of trust which typifies members of the first and second class, engage in a deliberate effort or practice to identify and expose covert agents "with the intent to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure." Since this class potentially includes any discloser of an undercover intelligence identity, the Committee has paid particular attention to limiting its embrace to those whose clear plan and practice is to identify and then place on the public record the secret identies of covert agents with the deliberate aim of disrupting a legitimate and highly valuable function of government. The Committee believes strongly that this specific intent standard, rather than a lesser "reason to believe" standard, is most appropriate and is bolstered in this belief by the recent Supreme Court decision in *Haig* v. *Agee*, 49 U.S. L. W. 4869 (1981).

The amendment adopted by the Committee makes clear that the focus of the statute is on those who are systematically engaged in the purposeful enterprise of seeking out and revealing the identities of covert agents with the intent that foreign intelligence activities will be impaired by the disclosure itself—in sum, on those who are in the business of "naming names" for the harm that such disclosure will produce.

It is the purpose of the Committee in limiting the above class to thereby preclude the inference and exclude the possibility that any speech—be it a casual discussion, political debate, the journalistic pursuit of a story on intelligence, or the disclosure of illegality or impropriety in government—other than that so described will be chilled by the enactment of the bill. Further, the bill also provides that no prosecutions for conspiracy, aiding or abetting, or misprision in the commission of an offense by a member of any of the three classes of individuals affected by the bill can occur unless the individual accused also evidenced, in the course of misconduct, the intent to impair or impede the foreign intelligence activities of the United States, or unless he has authorized access to classified information.

In addition to limiting the class of potential defendants to those who occupy a position of trust or to those who meet a narrowly drawn specific intent requirement, the Committee devoted great care in limiting the scope of the intelligence identities the disclosure of which should be criminalized. In so doing, the Committee relied on two principles of selection. First, it required that identities, to be protected, must be properly classified. Second, the disclosure of the identity must produce the possibility of harm to a covert agent, or the intelligence identity must be such that disclosure would likely reduce the individual's future effectiveness for intelligence purposes or impair other intelligence activities.

Using these criteria, the Committee has fashioned the definitions of protected identities to include only covert agents of the CIA, intelli-

gence components of the Department of Defense and the foreign counterintelligence and foreign counterterrorism components of the Federal Bureau of Investigation.

The Committee further defines the term covert agent to include only three categories of individuals. The first group consists of present officers or employees or members of the Armed Services of the above named agencies serving outside the United States or those whose professional involvement in clandestine operations will result in their serving overseas again. Such individuals all serve undercover, e.g., using alias or disguise. Serving overseas, they cannot claim the protection of U.S. laws or the police power of the government. Exposure abroad or within five years from last returning abroad (a provision calculated to include those who may be home in the U.S. for a tour or a visit) could—as it has already—result in heightened danger for these individuals or their families. Clearly, it would diminish their effectiveness as clandestine operators.

The second category includes U.S. citizens who reside and act outside the U.S. as agents, informants, or sources of operational assistance to an intelligence agency, or agents or informants of the FBI's counterintelligence or counterterrorism units wherever they may be. These individuals are those who, because of their operations overseas (although not necessarily continuous in span) or their involvement in the dangerous fields of counterintelligence or counterterrorism, could suffer severely because of public identification with a U.S. intelligence agency. In the case of the FBI agents or informants, even though they may be present in the U.S., the nature of the individuals and groups with which they come into contact suggests strongly that physical danger is a part of their operational milieu.[2]

The identity of each such individual in this second category must be properly classified. This group of individuals is one whose importance to U.S. intelligence operations is real. The category has been defined in such a way as to exclude those U.S. citizens residing in the United States whose relationship with an intelligence agency may be concealed but who would usually suffer only embarrassment from the disclosure of this relationship. For those operating outside the United States, on the other hand, the threat of physical danger, rather than mere embarrassment, is the most likely result of exposure. Such a criterion serves to exclude relationships which public policy may wish to conceal but the protection of which does not require the onus of criminal sanctions.

The last category of covert agent consists of all aliens who serve, or who have served, as agents, informants, or sources of operational assistance of intelligence agencies. To be included, their relationship must remain classified. The Committee feels that this more broadly defined group also reflects the realities of life for an alien who has assisted a U.S. intelligence agency and who remains overseas or ever

[2] The merits of the inclusion of these FBI covert agents were brought out in an exchange of correspondence between the Honorable C. W. Bill Young, a member of the Committee, and the Honorable William Webster, Director of the FBI. The FBI employees covered fall in a very narrow category of "special agents" in the foreign counterintelligence and counterterrorism fields who travel abroad for specific undercover assignments. The term "agent" when used in connection with the FBI, means an individual other than an FBI employee and should not be confused with a "special agent" of the FBI, who is an FBI employee.

hopes to return to his country. Without the anonymity of silence about a present or past relationship with the U.S. government, such individuals would neither continue the association nor—in some countries—hope to survive revelation of that relationship. The further ramifications of a public disclosure could include reprisals against family and friends, imprisonment or death.

In addition to the care with which the classes of individuals affected by the bill and those whose identities are to be protected have been defined, the Committee has also devoted care to the other elements of the offense noted in H.R. 4. All disclosures criminalized by the bill must be intentional, i.e., the defendant must have consciously and deliberately willed the act of disclosure. Further, the government must prove that what he knew included the full realization that the sum of his acts was the disclosure of a protected intelligence identity, one which he knew the government was taking affirmative steps to conceal. In effect, he must be shown to have known that he was disclosing an undercover relationship, one protected by the statute the bill would create.

The bill additionally creates an affirmative defense to the effect that no offense has been committed where the defendant can show that the government has publicly acknowledged or otherwise publicly revealed the intelligence identity the disclosure of which is the subject of the prosecution.

The Committee believes that it has considered and crafted the provisions of H.R. 4 with care. Its simple purpose has been to prevent the disruption of legitimate, important intelligence operations while avoiding the proscription of merely critical or newsworthy publications which are not accompanied by the requisite intent. The principle thrust of this effort has been to criminalize those disclosures which clearly represent the conscious and pernicious effort to eliminate the capability to conduct intelligence operations. Yet the Committee also recognizes that there is another aspect of this problem which requires a different solution.

The Committee is compelled to note that provisions for the concealment of intelligence operatives are not fully adequate, although a full discussion of cover for intelligence operatives abroad is inappropriate in the context of this public report. If cover is as easily penetrated as the record appears to indicate, then the burden must be on the Executive Branch generally, and the intelligence community in particular, to remedy this situation. Accordingly, the Committee has included a provision requiring the President to promulgate procedures that will help to rectify this situation. These procedures are to ensure that intelligence cover arrangements are effective. They are to provide that departments and agencies of government designated by the President are to afford all appropriate assistance—determined by the President—to this end.

This provision of the bill does not require the President to do anything not now being done about intelligence cover arrangements. It does not stipulate which elements of government shall provide assistance or what that assistance must be. It requires only that the President of the United States review these questions and determine the appropriate interest of the United States. In so doing, the provision

recognizes the fact that only the President has the authority and duty to truly resolve this question and only he will have the requisite detachment to make a decision that can result in the adequate provision of cover to undercover intelligence operatives.

Notwithstanding the above, and recognizing the fact of recent improvements, the Committee notes that the reason for the inclusion of the cover provision in the bill stems from a grave concern shared by all members that insufficient foresight has led to an atrophy of U.S. government policy in this area which does not contribute to the best possible U.S. intelligence effort. The Committee feels constrained to say no more about this subject except to note that it will communicate its strong feelings in this regard directly to the President.

Conclusion

The Committee does not pretend to believe that H.R. 4 will solve all the problems associated with preserving undercover intelligence identities, nor, as noted above, would it be constitutionally or practically prudent to do so. What H.R. 4 represents is the Committee's best judgment on a combination of provisions which, if implemented, will remove present dangers and those which are reasonably foreseeable. To critics of this carefully balanced approach this Committee can only offer its belief that the bill's strictures and requirements are delicately poised. To be effective, the bill has criminalized the disclosure of information which the government seeks to protect but which the defendant need not have acquired from classified (i.e., formally protected) sources. To be reasonable, this same approach requires very explicit involvement in systematized identification and disclosure of covert agents with a similarly clear and pernicious intent. The choices involved allowed no resort to simple answers, no comfort in exclusive principle or authority, no hope in present alternatives. The Committee strove to choose wisely. Careful application of the provisions of H.R. 4 will ensure the appropriateness of the choices made.

History of the Bill

H.R. 5615, the predecessor of H.R. 4, was introduced in the 96th Congress by Mr. Boland, chairman of the Committee, on October 17, 1979. It was cosponsored by all the members of the Committee.

In January of 1980, the Subcommittee on Legislation, with Mr. Mazzoli presiding, conducted two full days of hearings on H.R. 5615 and other proposals which would have established criminal penalties for the unauthorized disclosure of the names of undercover U.S. intelligence officers and agents. The subcommittee heard from the following witnesses:

Representative James C. Wright (D.-Texas).

Representative Charles E. Bennett (D.-Florida).

Honorable Frank C. Carlucci, Deputy Director of Central Intelligence.

Robert L. Keuch, Esq., Associate Deputy Attorney General.

William E. Colby, former Director of Central Intelligence.

Floyd Abrams, Esq., Cahill, Gordon & Reindel.

Jack Blake, President, Association of Former Intelligence Officers.

Morton Halperin, director, Center for National Security Studies.
John Shattuck, director, Washington Legislative Office, ACLU.
Jerry J. Berman, Esq., legislative counsel, ACLU.
Ford Rowan, assistant professor of journalism, Northwestern University.
M. Stanton Evans, political commentator and director, National Journalism Center.
William H. Schaap, coeditor, CovertAction Information Bulletin.
Ellen Ray, coeditor, CovertAction Information Bulletin.
Louis Wolf, coeditor, CovertAction Information Bulletin.

On July 25, 1980, the full committee met to consider intelligence identities legislation. H.R. 5615, as amended, was approved by voice vote and ordered reported favorably (H. Rept. 96–1219, Part 1).

H.R. 5615 was then referred to the Committee on the Judiciary. On August 19 and 20, the Subcommittee on Civil and Constitutional Rights, chaired by Representative Don Edwards, conducted hearings on the bill.

On August 26, 1980, the Subcommittee met to consider H.R. 5615, made amendment thereto, and by a vote of six yeas ordered the bill as amended reported to the full Committee as a substitute to the Intelligence Committee's bill. During the Subcommittee's consideration of the bill, three amendments were adopted: (1) Then section 501(c) was deleted; (2) All coverage of FBI employees, informants and sources was deleted; and (3) A defense was added to then section 502 for those instances in which a covert agent identified himself.

On September 3, 1980, the full Judiciary Committee met to consider the Intelligence Committee amendment in the nature of a substitute and the Subcommittee substitute. The Committee rejected the Subcommittee substitute by a vote of 9 yeas to 18 nays and then adopted the bill as amended by the Intelligence Committee by a vote of 21 yeas to 8 nays and ordered it reported favorably to the House (H. Rept. 96–1219, Part 2).

The 96th Congress adjourned sine die before the House was able to undertake floor consideration of H.R. 5615.

H.R. 4, a bill identical to that reported by the Intelligence and Judiciary Committees in the 96th Congress, was introduced in the 97th Congress on January 5, 1981, by Mr. Boland, Mr. Mazzoli, and Mr. Robinson, and referred to the Permanent Select Committee on Intelligence.

On April 7 and 8, 1981, the Subcommittee on Legislation, chaired by Mr. Mazzoli, conducted hearings on the bill and heard from the following witnesses:

Honorable James C. Wright (D., Texas).
Honorable William Casey, Director of Central Intelligence.
Daniel B. Silver, Esq., General Counsel, Central Intelligence Agency.
Richard K. Willard, Esq., Counsel to the Attorney General for Intelligence Policy.
John S. Warner, Esq., legal advisor to the Association of Former Intelligence Officers, and former General Counsel, Central Intelligence Agency.
Kenneth C. Bass III, Esq., former Counsel to the Attorney General for Intelligence Policy.

Jerry J. Berman, Esq. and Morton Halperin, American Civil Liberties Union.

Robert D. G. Lewis, chairman, National Freedom of Information Committee, Society of Professional Journalists, Sigma Delta Chi.

Floyd Abrams, Esq., Cahill, Gordon & Reindel, New York, N.Y.

Philip B. Heymann, Esq., professor of law, Harvard University Law School, former Assistant Attorney General, Criminal Division, Department of Justice.

Antonin Scalia, Esq., professor of law, Stanford Law School, former Assistant Attorney General, Office of Legal Counsel, Department of Justice.

On July 16, 1981, the Subcommittee on Legislation met to consider H.R. 4, made amendment thereto, and, with a quorum present, by a voice vote ordered the bill as amended reported to the full Committee.

On July 22, 1981, the full Committee met to consider H.R. 4 as amended, made further amendment thereto, and, with a quorum present, by a voice vote ordered the bill as amended reported favorably to the House. (During the Committee's consideration of the bill, a technical amendment was adopted changing the numbering of the bill's section from 501–506 to 601–606.)

Section-by-Section Analysis

SECTION 601—DISCLOSURE OF IDENTITIES

Section 601 establishes three distinct criminal offenses for the intentional disclosure to unauthorized persons of information identifying covert agents. The distinction among the offenses is based on the defendant's previous authorized access to classified information, or lack thereof. The greater the degree of such access, the greater is the duty of trust assumed by the defendant and the greater is the penalty for breach of such duty. In addition, the elements of proof are fewer against defendants with authorized access to classified information.

Section 601(a) applies to those individuals who have been given authorized access to classified information which identifies a covert agent. Such individuals, usually employees of the United States with the most sensitive security clearances, have by their own affirmative, voluntary action undertaken a duty of nondisclosure of the nation's most sensitive secrets. It is appropriate, in the Committee's view, to impose severe penalties for the breach of this duty and to hold a defendant in such category to stricter standards of liability.

Therefore, an individual who has had authorized access to classified information identifying a covert agent would be subject to a fine of $50,000 or imprisonment for ten years, or both, if he or she—

> intentionally discloses, to any individual not authorized to receive classified information, any information identifying such agent;
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> knowing that the information disclosed identifies such agent; and
>
> knowing that the United States is taking affirmative measures to conceal the agent's intelligence relationship to the United States.

The word "intentionally" was carefully chosen to reflect the Committee's intent to require that the government prove the most exacting state of mind element in connection with section 601 offenses.[3]

It should be evident, but the Committee wishes to make perfectly clear, that the words "identifies", "identifying", and "identify", which are used throughout section 601 are intended to connote a correct status as a covert agent. To falsely accuse someone of being a covert agent is not a crime under this bill.

The reference to "affirmative measures" is intended to narrowly confine the effect of the bill to relationships that are deliberately concealed by the United States Government.

The bill would apply to disclosure of an identity only where affirmative measures had been taken to conceal such identity, as, for example, by creating a cover or alias identity or, in the case of intelligence sources, by using clandestine means of communication and meeting to conceal the relationship involved. Proof of knowledge that the United States takes affirmative measures to conceal the relationship will depend upon the facts and circumstances of each case. Proof of knowledge could be demonstrated by showing that the person disclosing the information has or had an employment or other relationship with the United States that required or gave him such knowledge. It could also be demonstrated by statements made in connection with a disclosure or by previous statements evidencing such knowledge.

It also is to be emphasized that though the identity disclosed must be properly classified (see section 606(4)), the actual information disclosed need not be classified. For example, the phone number, address, or automobile license number of the CIA station chief in Ruritania is not classified information; the disclosure of such information in a manner which identifies the holder as the CIA station chief is an offense under the bill. However, the connection between the information disclosed and the correct identity of the covert agent must be direct, immediate, and obvious.

Finally, in connection with section 601(a), it should be noted that the identity which is disclosed and which is the subject of the prosecution must be an identity to which the offender, through authorized access to classified information, was specifically given access.

Section 601(b) applies to those who learn the identity of a covert agent "as a result of having authorized access to classified information". Basically, it covers those whose security clearance place them in a position from which the identity of a covert agent becomes known or is made known. For example, such a person could be one who worked at the same location as an undercover CIA officer. The distinction between this category of offenders, and the category covered by section 601(a), is that under section 601(a) the offender must have had authorized access to specific classified information which identifies the covert agent whose disclosure is the basis for the prosecution. Section 601(b), on the other hand, requires that the identity be learned only "as a result" of an authorized access to classified information in general.

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[3] Lesser degrees of mental culpability are knowing, reckless, and negligent. See S. Rept. 96-553, pp. 62-69 (Criminal Code Reform Act of 1979, Report of the Committee on the Judiciary, U.S. Senate, to accompany S. 1722.)

As with those covered by section 601(a), those in the 601(b) category have placed themselves in a special position of trust vis-a-vis the United States government. Therefore, it is proper to levy stiffer penalties and require fewer elements to be proved than for those who have never had any authorized access to classified information (see section 601(c)). However, the Committee recognizes that there is a subtle but significant difference in the position of trust assumed between an offender within the section 601(a) category and an offender in the section 601(b) category. Therefore, the penalty for a conviction under section 601(b) is a fine of $25,000 or 5 years imprisonment, or both.

With the two exceptions discussed above—the relationship of the offender to classified information and the penalty for conviction—the two offenses, and the elements of proof therefor, are the same.

Section 601(c) applies to any person who discloses the identity of a covert agent.

As is required by subsections (a) and (b), the government must prove that the disclosure was intentional, that the relationship disclosed was properly classified, and that the offender knew that the government was taking affirmative measures to conceal the intelligence relationship of the covert agent.

Furthermore, as is also the case with sections (a) or (b), the actual information disclosed does not have to be classified.

Unlike the previous two sections, authorized access to classified information is not a prerequisite to a conviction under section 601(c). An offender under this section has not voluntarily agreed to protect any government information nor does he owe the government any particular duty of nondisclosure. Therefore, section 601(c) establishes two elements of proof not found in sections 601(a) or (b). The United States must prove that the disclosure was made in the course of an effort to identify and expose covert agents, and that the effort was underaken with the intent to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure. In discussing this section in its report in the 96th Congress on H.R. 5615 (H.R. Rept. 96–1219, Part 1), the Committee stated:

> H.R. 5615, as introduced, required that to be criminal the disclosure made by those with no access to classified information would have to be made "with the intent to impair or impede the foreign intelligence activities of the United States." Both public and Government witnesses criticized this provision as too sweeping. They stated their belief that it could be used to punish journalists and others who wrote stories or spoke out about intelligence failures or wrongdoing or Government whistleblowers, even though the bill states in section 502(c)[4] that the specific intent element cannot be proved solely by the fact of the disclosure itself.
>
> As reported, the bill seeks to meet these criticisms by requiring that the disclosure must be "in the course of an effort to identify and expose covert agents with the intent to impair and impede the foreign intelligence activities of the United

[4] This section was deleted by the Committee's amendment to H.R. 4.

States." The added requirement that the disclosure be "in the course of an effort to identify and expose" undercover officers and agents makes it clear that the defendant must be engaged in a conscious plan to seek out undercover intelligence operatives and expose them with the intent to destroy U.S. intelligence efforts. The defendant, in other words, has made it a practice to ferret out and then expose undercover officers or agents for the purpose of damaging an intelligence agency's effectiveness and the disclosure which is the subject of the prosecution must be made with that intent. It should be noted that, though in most cases an offense will require a series of disclosures, in some circumstances, where other evidence can demonstrate a plan or practice, one disclosure would be sufficient to establish an offense under this subsection. Whistleblowers, those who republish previous disclosures, and critics of the U.S. intelligence would all stand beyond the reach of the law if they made their disclosures for purposes other than the impairment of U.S. intelligence activities.

A journalist writing stories about the CIA would not be engaged in the requisite "effort," even if the stories he or she wrote included the names of one or more covert agents, unless the Government proved that there was a specific effort to identify and expose agents and that this effort was intended to impair or impede. For example, an effort by a private institution to determine if, against its policy, an employee is also an employee or agent of an intelligence agency, would not be covered.

The Government, of course, can attempt to demonstrate such disclosures were made with the intent to impair or impede and in the course of an effort so intended.[5] It would not be sufficient to show that the discloser had reason to believe that the release would impair or impede, rather the Government must show that that was the purposes of the disclosure.

In spite of the above explanation, and the bill language to which it applied, the hearings of the Subcommittee on Legislation on H.R. 4 demonstrated the continued existence of considerable doubt as to the wisdom and/or constitutionality of the words chosen by the Committee to achieve its purpose of proscribing the conduct of those in the business of naming names who have had no access to classified information.

To eliminate the doubt and to better express what has always been the Committee's intent—to criminalize the disclosure of the identities of undercover intelligence officers undertaken in order to cripple our intelligence capabilities—the Committee has added to section 601(c) the words "by the fact of such identification and exposure." With this language, the Committee believes, it is made clear that the focus of the statute is on those who are systematically engaged in the purposeful enterprise of seeking out and revealing the identities of covert agents with the intent that foreign intelligence activities will be impaired by

[5] The intent element of then sec. 501(c), applying to the particular disclosure which is the subject of the indictment, was deleted by the Committee's amendment to H.R. 4.

the disclosure itself—in sum, on those who are in the business of "naming names" for the harm that such disclosure will produce.[6]

To be subject to prosecution under section 601(c), one who discloses the identity of a covert agent must specifically intend that the impairing or impeding be the result of the identification and disclosure. For example, the discloser might intend, among other things, the expulsion of the agent by the foreign government, his arrest, the refusal of his "assets" to work with him, or the recall of the individual by the CIA because his cover has been compromised. On the other hand, one who seeks to indirectly influence the activities of covert agents merely by influencing public debate in the United States or urging executive or legislative action is beyond the reach of this section.

Testimony on H.R. 4 and earlier versions of this legislation indicated that its drafters and supporters intended this interpretation. The addition of the language is simply to make clear that this is the meaning of the statute.

The Department of Justice in testimony before the Senate Judiciary Committee in the last Congress expressed this distinction this way:

> [Section 601(c)] does not seek to prohibit discussion generally, but is directed at the individual who takes it upon himself to bring intelligence activity to a halt and who does this, not by urging a change in public law or policy, but by ferreting out the identities of individuals who are involved in intelligence activities and by disclosing those identities with the intent the intelligence functions will be disrupted by the disclosure itself.[7]

In his testimony before the Subcommittee on Legislation, Professor Scalia stated that he understood the structure of the statute to require an intent "to impair or impede our foreign intelligence activities through the act of disclosure rendering those activities ineffective, self-operative ineffectiveness, not looking towards legislative or public action."

The effect of the amendment on Sec. 601(c) is to establish firmly that, assuming the other elements are proved, a defendant in a 601(c) prosecution should be found guilty if, after an effort to learn and expose the identities of covert agents for the purpose of obstructing intelligence activities or recruiting assets by the fact of such identification and exposure, he discloses information making their association with U.S. intelligence public. If the government fails to establish to the satisfaction of the jury that he had such intent then, even though he knew that his conduct would have the effect of directly impeding or impairing intelligence activities, he should be found not guilty. On the other hand, if the government can establish to the satisfaction of the jury that the defendant had such an intent, even if the jury believes he had some additional purposes, he should be found guilty.

With the additional language, the Committee felt it superfluous to retain the double intent element found in H.R. 4 as introduced, and,

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[6] The Committee wishes to make clear that by adding the new language to the malicious intent requirement, it does not intend to restrict proof thereof to statements made or actions occurring contemporaneously with the actual disclosure. Of course, it is up to the court to determine what is relevant evidence.

[7] "Intelligence Identities Protection Act, S. 2216, Hearing before the Committee on the Judiciary," U.S. Senate, 96th Congress, 2d session, p. 92.

therefore, struck the intent requirement as it applied to the actual disclosure. The actual disclosure, of course, must arise out of the effort.

Also, in light of the changes it has made, the Committee has decided to delete from what is now section 602 the following language:

> In any prosecution under section [601(c)], proof of intentional disclosure of information described in such section, or inferences derived from proof of such disclosure, shall not alone constitute proof of intent to impair or impede the foreign intelligence activities of the United States.

The burden of proving specific intent is always a heavy one, particularly in the way it is now exactingly required by section 601(c). The Committee believes that the amended Section 601(c) renders this section unnecessary.

As to the language of section 601(c) which has not been changed, the Committee adheres to the discussion of H.R. 5615 quoted above. To summarize, a disclosure, to be sanctionable, must be made "in the course of an effort", the "effort" must include activities seeking both to identify and to expose, and the "effort", i.e., a series of such acts, must have a specific intent to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure. Presumably, it would be extremely difficult to demonstrate the necessary effort and the necessary intent to impair or impede as to a person who discloses identities as an integral part of another enterprise such as news media reporting of intelligence failures or abuses, academic studies of U.S. government policies and programs, or a private organization's enforcement of its internal rules.

It should be understood that an offense under section 601(c) hinges upon the substance of the intent of the individual making the proscribed disclosure, not the form of the disclosure itself—although this may be relevant. Thus, the fact that an unauthorized disclosure of a covert agent's identity is accomplished in the context of a narrative about U.S. intelligence activities rather than in the form of a list of identities would not, in and of itself, absolve the person making such disclosure of liability under the statute.

SECTION 602—DEFENSES AND EXCEPTIONS

Section 602(a) states that—

> it is a defense to a prosecution under section 601 that before the commission of the offense with which the defendant is charged, the United States had publicly acknowledged or revealed the intelligence relationship to the United States of the individual the disclosure of whose intelligence relationship to the United States is the basis for the prosecution.

This provision is intended to encompass such public activities as official publications of the United States, or official statements or press releases made by those acting on behalf of the United States, which specifically acknowledge or reveal an intelligence relationship. In addition, the United States has "revealed" an intelligence relationship if it has published information which directly and immediately identi-

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fies someone as a covert agent. An identification is not direct and immediate if it can be made only after an effort to seek out and compare, cross-reference, and collate information from several publications or sources.

Section 602(b) (1) and (2) insure that a prosecution cannot be maintained under section 601 (a), (b), or (c), upon theories of aiding and abetting, misprision of a felony, or conspiracy, against an individual who does not actually disclose information unless the government can prove the "in the course of an effort" and the intent elements which are part of the substantive offense of section 601(c) or that the defendant has authorized access to classified information. A reporter to whom is leaked, illegally, the identity of a covert agent by a person prosecutable under section 601 (a) or (b) would most likely not possess the necessary intent or be engaging in the requisite course of conduct.

Section 602(c) is intended to make clear that disclosures made directly to the House or Senate Intelligence Committees are not criminal offenses.

SECTION 603—PROCEDURES FOR ESTABLISHING COVER FOR INTELLIGENCE OFFICERS AND EMPLOYEES

Section 603 requires the President to establish procedures to ensure that undercover intelligence officers and employees receive effective cover. To this end, the section also stipulates that the procedures shall provide that those departments and agencies of the government designated by the President to provide assistance for cover arrangements shall provide whatever assistance the President deems necessary to effectively maintain the secrecy of such officers and employees.

This provision of the bill does not require the President to do anything not now being done about intelligence cover arrangements. It does not stipulate which elements of government shall provide assistance or what that assistance must be. It requires only that the President of the United States review these questions and determine the appropriate interest of the United States. In so doing, the provision recognizes the fact that only the President has the authority and duty to truly resolve this question and only he will have the requisite detachment to make a decision that can result in the adequate provision of cover to undercover intelligence operations.

The Committee notes that since what is now Sec. 603 was first adopted in the 96th Congress, concern has been expressed that it may be used to require the Peace Corps to provide cover for intelligence purposes. This is not the intent of the Committee, which agrees with the decision of successive administrations not to use the Peace Corps for any foreign intelligence purpose. The Committee also agrees that it is important to assure people throughout the world that this policy continues unchanged so that confidence in the Peace Corps remains high.

Further, the Committee is aware that the intelligence community neither seeks nor would support the use of the Peace Corps in this fashion.

This is documented by a recent letter from the Honorable William J. Casey, Director of Central Intelligence, to the Honorable Loret Miller Ruppe, Director of the Peace Corps, which reads as follows:

DEAR MRS. RUPPE: Your letter of June 25, 1981, requested my views regarding policies governing cover relationships between CIA and the Peace Corps in connection with S. 391, the Intelligence Identities Protection Act, which will be considered by the Senate Judiciary Committee soon. Companion legislation, H.R. 4, is also pending in the House.

I understand that you are concerned with a provision in that proposed legislation that would require departments and agencies of the government designated by the President to provide assistance for cover arrangements to provide whatever assistance the President deems necessary to effectively maintain the secrecy of intelligence officers and employees. This language does not mandate that the Peace Corps or any other particular agency provide cover for intelligence personnel. Moreover, I do not advocate and would oppose any designation of the Peace Corps as an agency required to provide cover support. For these reasons, I am sure that you will agree that there is no need for a specific statutory exclusion of the Peace Corps from the cover provision of the proposed bill. Moreover, such a proposed amendment would be misleading for it would suggest that CIA desires to change its policy in this regard.

I can assure you that I have no intention of seeking to use the Peace Corps to provide cover for clandestine intelligence collection conducted by Central Intelligence Agency personnel. I certainly do not intend to change the long-standing CIA policy barring such use of the Peace Corps, which is reflected in existing regulations.

Thank you for the opportunity to express my views. I hope that I have reassured you regarding CIA intentions. If you have any specific questions whatsoever regarding our policies, my General Counsel, Mr. Stanley Sporkin, will be happy to answer them. I look forward to an amicable relationship with you in the future.

Sincerely,

WILLIAM J. CASEY.

It is the Committee's belief that, based on the assurances of the Director of Central Intelligence, the President will not suggest any change in the traditional distance which has separated the Peace Corps and intellignce operations.

Nevertheless, should the intelligence community contemplate a change in this policy at any time in the future, the Committee would consider such a contemplated change to be a "significant anticipated intelligence activity" which must, under law, be reported to the Committee before it is implemented. The Committee would question seriously any such change of policy.

Section 603(b) excepts the mandated regulations from any requirement for public disclosure. In lieu of such disclosure, the Committee expects the regulations to be made available to the House and Senate Intelligence Committee. The Committee would also note that it is not its intent that section 603 be interpreted to require or suggest that existing public regulations concerning use of clerics, academics and media for cover be made secret.

SECTION 604—EXTRATERRITORIAL JURISDICTION

This section is intended to remove any doubt of the Congress's intent to authorize the federal government to prosecute a United States citizen or permanent resident alien for an offense under section 601 committed outside of the United States.[8]

SECTION 605—PROVIDING INFORMATION TO CONGRESS

This section is intended to make it absolutely clear that no provision of the legislation may be relied on in any manner by the executive branch as a basis for withholding information from the Congress.

SECTION 606—DEFINITIONS

Section 606(1) defines "classified information". It means identifiable information or material which has been given protection from unauthorized disclosure for reasons of national security pursuant to the provisions of a statute or executive order.

Section 606(2) defines "authorized". When used with respect to access to classified information it means having authority, right, or permission pursuant to the provisions of a statute, executive order, directive of the head of any department or agency engaged in foreign intelligence or foreign counterintelligence activities, order of a United States court, or the provisions of any rule of the House of Representatives or resolution of the Senate which assigns responsibility within the respective House of Congress for the oversight of intelligence activities.

Section 606(3) defines "disclose". It means to communicate, provide, impart, transmit, transfer, convey, publish, or otherwise make available. While the definition would embrace republication in some circumstances, it is not the intent of the Committee that each and every disclosure, no matter how attenuated, be covered. The harm this bill is designed to protect against is done as soon as an identity is widely known. To punish each subsequent disclosure or republication, no matter how well known the information, serves little, if any, public interest.

Section 606(4) defines "covert agent". The term encompass three distinct groups. In the first group are officers or employees of (or members of the Armed Forces assigned to) an intelligence agency whose identities are properly classified and who are serving outside the United States at the time of the disclosure or have so served within the previous five years.

In the second group are U.S. citizens who are agents or informants of the foreign counterintelligence or counterterrorism components of the FBI, or U.S. citizens outside the U.S. who are agents of, or informants or sources of operational assistance to an intelligence agency. In each instance the intelligence relationship must be properly classified.

[8] For discussion of Congress's power to authorize such prosecution, see "Notes, Extraterritorial Jurisdiction—Criminal Law" 13 Harv. Int. Law Journal 347; "Extraterritorial Application of Penal Legislaton," 64 Mich. Law Rev. 609; and Working Papers of the National Commission on Reform of Federal Criminal Laws, vol. I, p. 69 (1970).

In the third group are present or former agents of an intelligence agency and informants or sources of operational assistance to an intelligence agency whose identity is properly classified and who are not U.S. citizens.

The Committee intends the term "agent" to be construed according to traditional agency law. Essentially, an agent is a non-employee over whom is exercised a degree of direction and control. A "source of operational assistance" on the other hand, is a non-employee who acts pursuant to the direction of, or performs services for, an intelligence agency. The term does not include someone who receives funds or other support, directly or indirectly, from an intelligence agency to perform activities in which he would otherwise be engaged. For example, if an intelligence agency funnels money to a foreign leader or foreign political party the leader or party official would not thereby become a source of operational assistance unless the individual performs services of a nature that would be performed by an employee, agent or informant of an intelligence agency.

The Committee has given long and careful thought to the definition of "covert agent" and has included within it only those identities which it is absolutely necessary to protect for reasons of imminent danger to life or significant interference with legitimate and vital intelligence activities. Undercover officers and employees overseas are in special danger when their identities are revealed, as recent events indicate. In addition, U.S. intelligence activities are disrupted severely when the identity of an officer in the clandestine service is disclosed, even when he or she is temporarily in the United States for rest, training, or reassignment. Thus, the definition includes those intelligence agency officers or employes whose identities have a classified cover and who have served overseas within the previous five years.

Agents and informants overseas who are not United States citizens can expect instant retribution when their relationship to the United States is exposed. If they reside in the United States their relatives abroad are endangered. In both instances, important sources of information are denied by disclosure, and possible future sources are less forthcoming. For these reasons the bill protects the identities of foreign agents, informants and sources be they within or without the United States at the time of the disclosure.

The Committee has carefully crafted H.R. 4 to insure it does not chill or stifle public criticism of intelligence activities or public debate concerning intelligence policy. An example of such drafting is the manner in which the definition of "covert agent" treats U.S. citizens who are not intelligence agency officers or employees. If such individuals—informants or sources—reside and act outside the United States, the revelation of their relationship would expose them to immediate and serious danger, and so their identity is protected.

However, the physical danger element is much less, if present at all, within the United States. Furthermore, U.S. citizens residing within the U.S. who assist intelligence agencies may be employees of colleges, churches, the media, or political organizations. The degree of involvement of these groups with intelligence agencies is a legitimate subject of national debate and intra-group discourse.

Therefore, the bill, in establishing criminal offenses for disclosures of the identities of covert agents, includes U.S. citizens residing within the United States within the operative definition only if the citizen is an agent of or informant to the foreign counterintelligence or foreign counterterrorism components of the FBI. These components are especially significant in terms of the country's real national security interests and maintain particularly sensitive relationships with their agents and informants. Domestic agents and informants of the CIA or the DOD who are U.S. citizens are not included within the definition.

Section 606(5) defines "intelligence agency". It means the Central Intelligence Agency, any foreign intelligence component of the Department of Defense, or the foreign counterintelligence or foreign counterterrorism components of the FBI.

Section 606(6) defines "informant". It means any individual who furnishes information to an intelligence agency in the course of a confidential relationship protecting the identity of such individual from public disclosure. This definition, along with that of "covert agent", insures that the term "informant" does not include all possible sources of assistance or information, but is narrowly defined to bring within it a limited number of individuals whose identity is classified and whose relationship with an agency is or has been conducted on a regularized and ongoing basis as part of an established informant program.

Section 606(7) defines "officer" and "employee" with the definition given such terms by section 2104 and 2105, respectively, of Title 5, United States Code.

Section 606(8) defines "Armed Forces" to mean the Army, Navy, Air Force, Marine Corps, and Coast Guard.

Section 606(9) defines "United States." When used in a geographic sense it means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.

Committee Position

On July 22, 1981, a quorum being present, the Permanent Select Committee on Intelligence approved H.R. 4, with an amendment, by voice vote and ordered that it be reported favorably.

OVERSIGHT FINDINGS

With respect to clause 2(1)(3)(A) of Rule XI of the Rules of the House of Representatives, the Committee notes that it has conducted an extensive investigation, which has included both public and executive session hearings, on the ability of the United States to keep secret the identities of its undercover intelligence officers and agents. The Committee findings in this area have resulted in its recommendation that new legislation (H.R. 4) be enacted. The Committee's reasoning for its recommendation is set out in the body of this report.

CONGRESSIONAL BUDGET ACT

Pursuant to clause 2(1)(3)(B) of Rule XI of the Rules of the House of Representatives, the Committee notes that this legislation does not provide for new budget authority or tax expenditures.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 2(1)(3)(C) of Rule XI of the Rules of the House of Representatives, the Committee notes that it has not received an estimate from the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974.

RECOMMENDATION OF THE COMMITTEE ON GOVERNMENT OPERATIONS

Pursuant to clause 2(1)(3)(D) of Rule XI of the Rules of the House of Representatives, the Committee notes that it has not received a report from the Committee on Government Operations.

INFLATION IMPACT STATEMENT

Pursuant to clause 2(1)(4) of Rule XI of the Rules of the House of Representatives, the Committee finds that enactment of H.R. 4 will have no inflationary impact on prices or costs in the operation of the national economy.

FIVE-YEAR COST PROJECTION

Pursuant to clause 7(a)(1) of Rule XIII of the Rules of the House of Representatives, the Committee has determined that no measurable additional costs will be incurred by the government in the administration of H.R. 4.

EXECUTIVE BRANCH ESTIMATES

The Committee has received no cost estimates from the executive branch and is therefore unable to compare the government's cost estimates with its own estimates pursuant to clause 7(a)(2) of Rule XIII of the Rules of the House of Representatives.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill as reported, are shown as follows (new matter is printed in italic, existing law in which no change is proposed is shown in roman):

NATIONAL SECURITY ACT OF 1947

AN ACT To promote the national security by providing for a Secretary of Defense; for a National Military Establishment; for a Department of the Army, a Department of the Navy, and a Department of the Air Force; and for the coordination of the activities of the National Military Establishment with other departments and agencies of the Government concerned with the national security

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

That this Act may be cited as the "National Security Act of 1947".

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TITLE VI—PROTECTION OF CERTAIN NATIONAL SECURITY INFORMATION

DISCLOSURE OF IDENTITIES OF CERTAIN UNITED STATES UNDERCOVER INTELLIGENCE OFFICERS, AGENTS, INFORMANTS, AND SOURCES

SEC. 601. (a) Whoever, having or having had authorized access to classified information that identifies a covert agent, intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $50,000 or imprisoned not more than ten years, or both.

(b) Whoever, as a result of having authorized access to classified information, learns the identity of a covert agent and intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $25,000 or imprisoned not more than five years, or both.

(c) Whoever, in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure, discloses, to any individual not authorized to receive classified information, any information that identifies a covert agent knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

DEFENSES AND EXCEPTIONS

SEC. 602. (a) It is a defense to a prosecution under section 601 that before the commission of the offense with which the defendant is charged, the United States had publicly acknowledged or revealed the intelligence relationship to the United States of the individual the disclosure of whose intelligence relationship to the United States is the basis for the prosecution.

(b)(1) Subject to paragraph (2), no person other than a person committing an offense under section 601 shall be subject to prosecution under such section by virtue of section 2 or 4 of title 18, United States

Code, or shall be subject to prosecution for conspiracy to commit an offense under such section.

(2) Paragraph (1) shall not apply (A) in the case of a person who acted in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure, or (B) in the case of a person who has authorized access to classified information.

(c) It shall not be an offense under section 601 to transmit information described in such section directly to the Select Committee on Intelligence of the Senate or to the Permanent Select Committee on Intelligence of the House of Representatives.

PROCEDURES FOR ESTABLISHING COVER FOR INTELLIGENCE OFFICERS AND EMPLOYEES

SEC. 603. (a) The President shall establish procedures to ensure that any individual who is an officer or employee of an intelligence agency, or a member of the Armed Forces assigned to duty with an intelligence agency, whose identity as such an officer, employee, or member is classified information and which the United States takes affirmative measures to conceal is afforded all appropriate assistance to ensure that the identity of such individual as such an officer, employee, or member is effectively concealed. Such procedures shall provide that any department or agency designated by the President for the purposes of this section shall provide such assistance as may be determined by the President to be necessary in order to establish and effectively maintain the secrecy of the identity of such individual as such an officer, employee, or member.

(b) Procedures established by the President pursuant to subsection (a) shall be exempt from any requirement for publication or disclosure.

EXTRATERRITORIAL JURISDICTION

SEC. 604. There is jurisdiction over an offense under section 601 committed outside the United States if the individual committing the offense is a citizen of the United States or an alien lawfully admitted to the United States for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act).

PROVIDING INFORMATION TO CONGRESS

SEC. 605. Nothing in this title shall be construed as authority to withhold information from Congress or from a committee of either House of Congress.

DEFINITIONS

SEC. 606. For the purposes of this title:

(1) The term "classified information" means information or material designated and clearly marked or clearly represented, pursuant to the provisions of a statute or Executive order (or a regulation or order issued pursuant to a statute or Executive order), as requiring a specific degree of protection against unauthorized disclosure for reasons of national security.

(2) *The term "authorized", when used with respect to access to classified information, means having authority, right, or permission pursuant to the provisions of a statute, Executive order, directive of the head of any department or agency engaged in foreign intelligence or counterintelligence activities, order of a United States court, or provisions of any Rule of the House of Representatives or resolution of the Senate which assigns responsibility within the respective House of Congress for the oversight of intelligence activities.*

(3) *The term "disclose" means to communicate, provide, impart, transmit, transfer, convey, publish, or otherwise make available.*

(4) *The term "covert agent" means—*

(A) *an officer or employee of an intelligence agency, or a member of the Armed Forces assigned to duty with an intelligence agency—*

(i) *whose identity as such an officer, employee, or member is classified information, and*

(ii) *who is serving outside the United States or has within the last five years served outside the United States;*

(B) *a United States citizen whose intelligence relationship to the United States is classified information and—*

(i) *who resides and acts outside the United States as an agent of, or informant or source of operational assistance to, an intelligence agency, or*

(ii) *who is at the time of the disclosure acting as an agent of, or informant to, the foreign counterintelligence or foreign counterterrorism components of the Federal Bureau of Investigation; or*

(C) *an individual, other than a United States citizen, whose past or present intelligence relationship to the United States is classified and who is a present or former agent of, or a present or former informant or source of operational assistance to, an intelligence agency.*

(5) *The term "intelligence agency" means the Central Intelligence Agency, the foreign intelligence components of the Department of Defense, or the foreign counterintelligence or foreign counterterrorist components of the Federal Bureau of Investigation.*

(6) *The term "informant" means any individual who furnishes information to an intelligence agency in the course of a confidential relationship protecting the identity of such individual from public disclosure.*

(7) *The terms "officer" and "employee" have the meanings given such terms by sections 2104 and 2105, respectively, of title 5, United States Code.*

(8) *The term "Armed Forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard.*

(9) *The term "United States", when used in a geographic sense, means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.*

SEPARATE VIEWS OF CONGRESSMAN JOHN ASHBROOK

The urgent need for this legislation was pointed out by the Chairman of the House Permanent Select Committee on Intelligence, Edward P. Boland, during the first markup of this bill on July 25, 1980.

The Chairman stated,

> The operating heart of any such service is the use of undercover agents and officers overseas to collect intelligence information. Obviously, if the names of these people are spread upon the public record, their usefulness is ended and the effectiveness of the clandestine service is diminished.
>
> In my opinion and, I think, in the opinion of the overwhelming majority of the American people, unauthorized disclosure of the names of undercover intelligence agents is a pernicious act that serves no useful informing function whatsoever. It does not alert us to abuses; it does not further civil liberties; it does not bring clarity to issues of national policy; it does not enlighten public debate; and it does not contribute one iota to the goal of an educated and informed electorate.
>
> Whatever the motives of those engaged in such activity, the only result is the complete disruption of our legitimate intelligence collection programs, programs that bear the imprimatur of the Congress, the President and the American people.
>
> Such a result benefits no one but our adversaries. The Committee therefore proposes to act on a problem of critical importance to our national security.

During the last session, there was not sufficient time to bring this important legislation to the floor. This session, the Intelligence Committee is again trying to move this vital bill.

Unfortunately, the delay has allowed the enemies of this bill to work to weaken it. The bill's primary opponents are of course Philip Agee, a renegade former CIA officer, his collaborators on the publication CovertAction Information Bulletin, and the other pernicious magazine Counter Spy. Agee was formerly associated with Counter Spy which like CovertAction Information Bulletin is in the business of attempting to impair or impede U.S. intelligence activities. One of the methods used is the identification of U.S. covert agents. Another is the publication of false allegations about our intelligence services, often repeating Soviet propaganda themes. For example, CovertAction Information Bulletin, in its issue of January 1979, printed as authentic a Soviet forgery of a supposed U.S. Army "Field Manual", despite the knowledge that it had been exposed as a forgery by the U.S. Government.[1]

[1] See Soviet Covert Action (The Forgery Offensive). Hearings before the Subcommittee on Oversight of the Permanent Select Committee on Intelligence, Feb. 6, 1980, pp. 12, 176–185.

The Agee apparat was joined with its efforts to weaken the bill by its allies Morton Halperin of the Center for National Security Studies and Jerry Berman of the American Civil Liberties Union. Both CNSS and ACLU serve with CovertAction Information Bulletin on the Steering Committee of an Anti-Intelligence lobby organization that calls itself the Campaign for Political Rights. Halperin went to England to appear as a witness for Agee when Agee was deported from that country. (London Daily Telegraph, Feb. 4, 1977, p. 2)

On July 13, 1981, Halperin and Berman visited the CIA Headquarters building in Langley, Virginia, to discuss a compromise on the names of agents bill. In exchange for modifying the language in section 501(c), (now 601(c)), they promised that their supporters would not try to delay the bill. Both CIA and a majority of the members of the House Permanent Select Committee on Intelligence agreed to accept a compromise which reads:

> Whoever, in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure, discloses to any individual not authorized to receive classified information, any information that identifies a covert agent knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationships to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

In a letter to Chairman Boland, the Director of Central Intelligence, William Casey, provided his view of this new language. He wrote on July 15:

> We would be prepared to support this alternative, which I understand is already familiar to members and staff of your Committee, if its adopting would insure House floor consideration of the identities bill directly following the reporting of H.R. 4 from your Committee. I must emphasize, however, that the Administration's preference for S. 391, the Senate version of the identities bill, remains unchanged.

The language of the Senate bill which the CIA and the Justice Department prefer is:

> Whoever, in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States, discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

The S. 391 language is both stronger and clearly constitutional. The activities covered in both the Senate and House versions were discussed by the Supreme Court in *Haig* v. *Agee* decided June 29, 1981. The court addressed the constitutional protection of the actions by Agee, a former CIA employee, while the bill covers both former employees and others. But, the basic constitutional principles apply in both cases. The Court held:

> Agee's disclosures, among other things, have the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel. They are clearly not protected by the Constitution. The mere fact that Agee is also engaged in criticism of the Government does not render his conduct beyond the reach of the law.

Since the language of both S. 391 and H.R. 4 are constitutional, the clearer, stronger language of S. 391 is preferable. The added phrase in H.R. 4 "by the fact of such identification and exposure" may provide a loophole for those who engage in the "naming of names" to slip through. A person with the intent to impair or impede who reveals the identities of covert agents may slip through the loophole in the bill by arguing that he intended to impair or impede intelligence activities by exposing the activities and that the naming of the covert agents was an incidental by-product. This new phrase narrows the bill too much and places too great a burden on the government. Of course, in a specific case, it is for the jury to decide if the law has been violated. But, the intent of Congress should be made clear by Congress. As a number of members pointed out in the full Committee markup, the report language accompanying the bill is extremely important. Unfortunately this majority report on this bill is vague and confused. It contains language that can only further weaken the bill. For example, the report states that:

> "One who seeks to indirectly influence the activities of covert agents merely by influencing public debate in the United States or urging executive or legislative action is beyond the reach of this section.

This is begging the question. If the person seeks to impair or impede intelligence activities by revealing the names of covert agents, his desire for public debate is irrelevant and he would be covered by the bill.

The following report language would be more useful in understanding the bill and would not create weakening ambiguities.

> As amended by the Subcommittee on Legislation, subsection 601(c) has been clarified by insertion of the phrase "by the fact of such identification and exposure." Inclusion of this phrase merely makes explicit what was always implied under the subsection, namely that the specified intent to impair or impede the foreign intelligence activities of the United States is evidence through the identification and exposure of covert agents.
>
> Clearly, then, the language of subsection 601(c) is meant to cover individuals who make the required effort to identify

and expose covert agents, possess the knowledge specified in subsection 601(c), and intend to impair or impede the foreign intelligence activities of the United States by the fact of identification and exposure of covert agents.

It is equally clear that the fact that such an individual may also simultaneously have an intent to impair or impede the foreign intelligence activities of the United States through some other means is immaterial. Thus, an individual who intends simultaneously to impair or impede the foreign intelligence activities of the United States by "naming names" and by exposing secret intelligence operations would be liable under the statute, because he possessed the requisite intent to impair or impede intelligence activities by the fact of identification and exposure of covert agents. Of course, whether or not an individual has this requisite intent would be a matter for the jury to decide.

Another example would be the case of an individual who intended to impair or impede U.S. intelligence activities by the fact of identification and exposure of covert agents, while simultaneously having the intent to impair or impede these intelligence activities by physical assault upon the person or property of such covert agents. This individual would also be liable under the statute.

It should also be clear that the nature of any such simultaneously held intent would make no difference. An individual who intended to impair or impede U.S. intelligence activities by the fact of identification and exposure of covert agents could not escape liability under the statute because he possessed to have the ultimate intent of making the foreign policy of the United States conform to his own conceptions of correctness or morality.

The Supreme Court has dealt with this precise point in its recent decision in *Haig* v. *Agee*. In discussing Agee's disclosures of intelligence identities, the Court declared "they are clearly not protected by the Constitution. The mere fact that Agee is also engaged in criticism of the government does not render his conduct beyond the reach of the law." (*Haig* v. *Agee*, No. 80–83, slip op. at 27.)

A useful analogy is provided by the crime of arson. An individual who maliciously destroys a dwelling by setting it on fire is no less guilty of arson because he acted out of personal belief that the building was an eyesore whose destruction would benefit the public.

Another matter which should be clear with respect to subsection 601(c) is that the offense under the subsection hinges upon the substance of the intent of the individual making the proscribed disclosure, not the form of the disclosure itself (although this may be relevant with respect to intent). Thus, the fact that unauthorized disclosures of covert agent identities are accomplished in the context of a narrative about U.S. intelligence activities rather than in the form of a list of identities would not, in and of itself, absolve the person making such disclosures of liability under the statute.

One matter not covered by H.R. 4 at this time is false identification. The U.S. official overseas, who is falsely identified, runs the same physical risks as the real covert agent. The bill should only cover false identification where a real risk to life exists. A number of the identifications made in Jamaica in July 1980 by Agee's collaborator, Louis Wolf, were false. Two of those named by him had their homes attacked by Armed hoodlums. One of the victims, Jesse Jones, who has left the government, has filed suit against Wolf and Covert Action Information Bulletin. A current government employee would be discouraged from filing suit. Jones was not a CIA covert agent, but after Wolf claimed he was, hoodlums exchanged gunfire with police guarding Jones' home.

Ladislav Bittman is the former Deputy Chief of the Disinformation Department of the Czech Intelligence Service. He testified before this Committee on February 19, 1980. Bittman told the Committee about a book published in 1968 called "Who's Who in the CIA." This book, by Julius Mader, a forerunner of the Agee apparat, was a joint project of the Czech and East German Intelligence Services. Bittman testified that half of the names listed in the book were not CIA, but were falsely identified to disrupt American diplomatic activities.[2]

Those who "name names" care nothing about the safety of those they name. When Agee was asked by Newsweek if his identifying names "make(s) agents vulnerable", he answered, "I really don't care too much about the element of vulnerability." [3]

As a number of members would like to address these issues in H.R. 4, an open rule would be the best way to handle this bill.

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[2] Ibid, p. 58.
[3] Newsweek, Aug. 22, 1977, p. 52.

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